APPENDIX

APPENDIX A

Constitutional Provision, Statutes, and Rules and Regulations Involved.

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Communications Act of 1934, 48 Stat. 1064, as amended:

Sec. 315:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the

foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section. (47 U.S.C., 1964 ed., Sec. 315.)

Sec. 326:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. (47 U.S.C., 1964 ed., Sec. 326.)

Federal Communications Commission Rules and Regulations—Amendments to Part 73, Chapter 1, 47 C.F.R.:

Rules adopted by the Commission July 5, 1967, 32 Fed. Reg. 10305-06:

Sec. 73.123. Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later

than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.

NOTE: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, section 315(a) of the Act (47 U.S.C. 315(a)); public notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reason-

able opportunity to prepare a response and to present it in a timely fashion.

[Secs. 73.300, 73.598 and 73.679, containing identical language, were also added.]

Amendments adopted by the Commission August 2, 1967, 32 Fed. Reg. 11532:

Sec. 73.123. Personal attacks; political editorials.

(b) The provisions of paragraph (a) of this section shall be inapplicable (1) to attacks on foreign groups or foreign public figures; (2) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (2), above. See, section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415.

[Secs. 73.300(b), 73.598(b) and 73.679(b) were also amended to contain identical language.]

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31560

COLUMBIA BROADCASTING SYSTEM, INC. *Petitioner*

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION *Respondents*

Petition for Review of an Order of the Federal Communications Commission

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Columbia Broadcasting System, Inc. (hereinafter Petitioner), by its attorneys presents this petition for judicial review of a final order of the Federal Communications Commission (hereinafter the Commission) and avers as follows:

I.

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

1. Petitioner owns and operates, pursuant to license from the Federal Communications Commission, television station WCBS-TV and radio stations WCBS and WCBS-FM in New York City, as well as television and/or radio stations in Boston, Chicago, Los Angeles, Philadelphia, St. Louis and San Francisco. Radio and television stations owned and operated by Petitioner regularly carry news broadcasts and other programs involving discussion of issues of a controversial nature. Some of these stations

also carry editorials endorsing candidates for political office. Petitioner also owns and operates a television network and a radio network, not licensed by the Commission, which furnish programs—including news and public affairs programs—daily to several hundred broadcast stations. Petitioner seeks review of an order of the Commission entered in proceedings entitled "In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates" (Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967, and released July 10, 1967, attached hereto as Appendix A).

2. These proceedings were initiated on April 6, 1966, by the issuance of a Notice of Proposed Rule Making (FCC 66-291). The proposal included provisions purporting to codify the "personal attack" and "political editorial" branches of the Commission's "fairness" doctrine. Comments were filed by Petitioner and others in opposition to the proposed rule, while other parties favored its adoption.

3. The proposed rule was attacked on various grounds; as an unconstitutional restraint on free speech, as beyond the Commission's statutory authority, and as contrary to the public interest and general regulatory policies of the Commission. In the Memorandum Opinion and Order under review the Commission rejected the objections of Petitioner and others, and adopted the Rule in substantially the form proposed in the Notice of Proposed Rule Making. Commissioner Loevinger concurred in a separate opinion, and Commissioner Bartley dissented. Commissioner Wadsworth was absent. As authority for the adoption of the Rule, the Commission invoked Sections 4(i), 4(j), 303(r) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 315.

4. The order under review amends Part 73 of the Commission's Rules (47 C.F.R.) by adding four identical sections (§§ 73.123, 73.300, 73.598 and 73.679) applying respectively to standard broadcast stations, FM broadcast stations, noncommercial educational FM broadcast stations, and television broadcast stations. Subsection (a) of the Rule provides that when, "during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group," the licensee must within a week notify such person or group of the broadcast, furnish a script, tape or accurate summary of the "attack," and offer such person or group "a reasonable opportunity to respond over the licensee's facilities." Subsection (b) exempts from the requirements of subsection (a) attacks on "foreign groups or foreign public figures" and attacks made by candidates and their spokesmen and associates on other candidates or their spokesmen or associates. Apart from the exemptions subsection (a) of the Rule applies to any statement, comment or remark constituting a "personal attack" broadcast over a station's facilities, whatever the source. The subsection applies to statements made in the course of a news program or actual live coverage of a news event, or in a discussion program or documentary. It applies whether the statement is truthful or untruthful, whether the broadcaster acted with "malice", and whether the program presented fairly or unfairly the controversial issue and the facts on which the "attack" is based. While the Commission has conceded that "there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle" and that "the Rules are not designed to answer such questions," the Commission has invited licensees to "consult" it for "interpretation of our rules and policies" (Appendix A, page 6).

5. Subsection (c) of the Rule requires that when "a licensee, in an editorial, (i) endorse or (ii) opposes a

legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial" a script or tape together with an offer of "a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities." Where the editorial is broadcast within 72 hours prior to the day of election, moreover, "the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion."

6. In the Order under review, the Commission for the first time has prescribed by rule specific procedures which must be followed in given situations in order to comply with the "fairness" doctrine. This Rule may be enforced through imposition of criminal penalties or forfeitures under Sections 502 and 503(b) of the Act, 47 U.S.C. §§ 502 and 503(b), as well as through license revocation and renewal proceedings under Sections 307 and 312 of the Act, 47 U.S.C. §§ 307 and 312.

II.

Statement of Venue and Jurisdiction

7. Petitioner is incorporated in the State of New York and has its principal place of business in New York City. Venue in this Court is thus appropriate under Section 3 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343. Since the order involved is a final order of the Federal Communications Commission, this Court has jurisdiction over the subject matter of this petition under Section 2 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2342; Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and Section

10(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 704.

8. As appears from paragraph 2 of the Commission's Memorandum Opinion and Order (Appendix A, page 1), Petitioner was a party to the proceedings leading to the Order under review, and filed comments in opposition to the proposed rule. Petitioner is a "party aggrieved" by reason of the Commission's Order within the meaning of Section 4 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343, and is further a "person suffering legal wrong" and a "person . . . adversely affected or aggrieved" by reason of the Commission's Order within the meaning of Section 10(a) of the Administrative Procedure Act, as amended, 5 U.S.C. § 702, as more fully set forth in paragraphs 9-11 hereof.

III.

Effects of the Rule

9. The right of reply established by the Rule would disserve rather than promote the public interest in accurate and balanced presentation of information and opinion with respect to controversial issues. For example there are situations in which the "personal attack" appears in the course of a discussion of a controversial issue of public importance, but in which the "personal attack" is merely peripheral to the public issue. Moreover, Petitioner and other licensees present many programs in which both sides of a controversial issue, including the position of persons or groups "personally attacked," are fully and fairly presented. In such cases a right of personal reply is not required to promote the public interest in an accurate report, and, if the reply is one-sided, will indeed tend to mislead the public. To attempt to correct the imbalance by a response to the reply would be likely to produce a repetition of the original "personal attack,"

thus creating an obligation to invite a further reply, and so on ad infinitum. A similar proliferation would occur if the reply contained a "personal attack" upon a second individual or group, since the Rule would then impose a duty to invite a rejoinder from still another quarter.

10. Subsection (a) of the Rule would inhibit free and vigorous expression and debate on controversial issues of public importance. The presentation of news, documentary and discussion broadcasts, in which there is a vital public interest, would often be rendered impracticable if an individual or group upon whom a "personal attack" was made had to be accorded a right of reply as required by the Commission's Rule. To the extent that "personal attacks" may be claimed to be defamatory, compliance with the notification requirements of the Rule may also jeopardize defenses to a subsequent defamation suit.

11. Subsection (c) of the Rule would condition the right of broadcast licensees to present an editorial endorsement or disapproval of candidates for public office by according a right of reply to unfavored candidates. This new requirement would inhibit editorial endorsements.

IV.

Grounds on Which Relief Is Sought

12. The grounds relied upon as the basis for relief are as follows:

(a) The Commission has exceeded its powers under the Communications Act in promulgating the Rule. Sections 4(i), 4(j) and 303(r) of the Act are merely authorizations to take action, by rule making and otherwise, to implement powers granted elsewhere in the statute. Section 315 is limited to a highly specific "equal opportunities" provision for candidates and a general reference to the "fairness" doctrine

which does not confer any powers on the Commission. Congress has refused to provide a general federal broadcast libel remedy or even to broaden the narrowly limited statutory right of political candidates to reply to one another; Congress did not intend to empower the Commission to create a new private remedy for "personal attacks."

(b) By imposing a specific requirement that in certain circumstances a particular program (i.e., the reply of a particular individual) must be carried, the Rule amounts to program censorship by the Commission in violation of Section 326 of the Communications Act, as amended, 47 U.S.C. § 326, prohibiting the Commission from exercising the power of censorship.

(c) Subsection (a) of the Rule would induce licensees to delete material they desire to broadcast for the sole purpose of eliminating possible "personal attacks" and thus reduce the burdens of complying with the Rule. The Rule is therefore contrary to the principles of free debate and discussion and to the spirit of the Act. *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

(d) The Rule violates the provision of Section 326 of the Communications Act that "no regulation . . . shall be promulgated or fixed by the Commission which shall interfere with the right of free speech. . . ." Moreover, it cannot be presumed that Congress in enacting the Communications Act intended to empower the Commission to issue rules raising substantial questions of interference with fundamental First Amendment rights. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Greene* v. *McElroy*, 360 U.S. 474 (1959).

(e) Whatever the intent of Congress, the Rule would abridge free expression, discussion and debate

in violation of the First Amendment. *New York Times, Inc.* v. *Sullivan*, 376 U.S. 254 (1964); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Mills* v. *Alabama*, 384 U.S. 264 (1966).

(f) Even if regulation of the subject matter by rule were held to be within the Commission's power, the adoption of the Rule would be an abuse of discretion. Without achieving any public interest goal of comparable importance, it would inhibit the dissemination of news, discussion of controversial public issues, and expression of editorial opinion, functions of communications media that are vital to the political health of a free society.

V.

Relief Prayed For

14. Wherefore, Petitioner respectfully prays that upon final hearing and review this Court will, by appropriate order, judgment or decree:

(a) Set aside and determine unlawful and without force and effect the Order of the Commission adopted July 5, 1967 in Docket No. 16574, and Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's Rules, adopted by said Order; and

(b) Grant such other or further relief as it determines to be just and necessary.

July 27, 1967.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31560

COLUMBIA BROADCASTING SYSTEM, INC. *Petitioner*

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION *Respondents*

Supplement to Petition for Review of an Order of the Federal Communications Commission

Columbia Broadcasting System, Inc. (hereinafter Petitioner), by its attorneys presents this supplement to its petition for judicial review of an order of the Federal Communications Commission (hereinafter the Commission), filed July 27, 1967, and avers as follows:

1. The Commission adopted on August 2, 1967, and released on August 7, 1967, a Memorandum Opinion and Order (No. FCC 67-923) amending the Rule adopted in the Order under review. A copy of the Memorandum Opinion and Order is attached hereto as Appendix A.

2. The amendment exempts from the requirements of Subsection (a) of the Rule (dealing with "personal attacks") "bona fide newscasts or on-the-spot coverage of a bona fide news event." The "personal attack" provision of Subsection (a) still applies, however, to news documentaries and news interview programs, as well as to "editorial or similar commentary" included in newscasts or on-the-spot coverage of news events. For example, statements made on a news interview program such as "Face The Nation," even though they are of sufficient

news magnitude to make the first page of Monday morning newspapers throughout the country, would appear to be covered by the Rule, although a newscast reporting that the identical statements had been made on "Face The Nation" would appear to be exempt.

3. The amended Rule fails to remedy many of the defects present in the original version. Indeed the Commission, in adopting the amendment, specifically recognized the inhibitory effect of the original Rule on news programs and for that reason exempted "bona fide newscasts or on-the-spot coverage of a bona fide news event." Nevertheless, the Commission has retained the Rule in full force and effect as to news documentaries and news interview programs. Nothing in the amendment makes the Rule any less inhibitory or objectionable with respect to such programs.

4. As amended, the Rule has become even more uncertain in its application. Not only must licensees decide whether a statement constitutes a "personal attack" or occurs "during the presentation of views on a controversial issue of public importance"; they must also make judgments as to whether, if the program involved is a "bona-fide newscast or on-the-spot coverage of a bona fide news event," so as to be generally exempt from the Rule, the attack nonetheless is of such a nature (e.g., "editorial or similar commentary") so as to bring it back within the scope of the Rule. There is no indication in the Commission Memorandum Opinion and Order, moreover, whether interviews and documentary-type material broadcast in the course of newscasts and on-the-spot coverage of news events are, like editorials and commentary broadcast in such programs, still subject to the Rule. Uncertainty on these points, and the impracticability of obtaining timely advisory pre-broadcast rulings with respect to such a perishable commodity as news, will inevitably lead to licensee decisions to refrain from broadcasting news-related material and programs

that are arguably subject to the Rule. And to the extent the Commission receives and acts upon post-broadcast requests for advisory interpretations and waivers of the Rule, it will become increasingly involved in making editorial judgments heretofore the responsibility of the broadcaster.

5. While the grounds for relief stated in the Petition for Review continue to apply to the Rule as amended, the effects of the amendment require amplification of the grounds for relief as follows:

(a) The uncertainty as to what portions of generally exempted programs are still subject to the amended "personal attack" provision renders the Rule unconstitutionally vague.

(b) Continual supervision by the Commission of editorial judgments of broadcasters, through orders directing that licensees permit replies to "personal attacks," violates Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, and abridges freedom of the press in violation of the First Amendment.

(c) Because there is no rational basis, in terms of the public interest, for the Commission's distinction between program material covered and program material exempted under the amended Rule, the adoption of the Rule is arbitrary, unreasonable, and an abuse of discretion.

6. WHEREFORE, Petitioner respectfully prays that upon final hearing and review this Court will, by appropriate order, judgment or decree:

(a) Set aside and determine unlawful and without force and effect the Order of the Commission adopted

July 5, 1967 in Docket No. 16574, as amended by the Order of the Commission adopted August 2, 1967 in said Docket, and Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's Rules, as amended, adopted by said Orders; and

(b) Grant such other or further relief as it determines to be just and necessary.

September 1, 1967.